STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Pickens County
Honorable Robin B. Stilwell, Circuit Court Judge
Appellate Case No. 2020-001595

THE STATE,

Petitioner,

vs.

CHARLES BRANDON RAMPEY,

Respondent.

STATE'S PETITION FOR REHEARING

In order for the judicial process to properly function as is essential to the interests of all South Carolina's citizens, it is critically important for cases to reach a final resolution at some point. Nickles v. Seaboard Air Line Ry., 74 S.C. 102, 142, 54 S.E. 255, 268 (1910). In light of that, trial judges by necessity have a long-recognized *duty* to urge juries to agree upon a verdict if at all possible. State v. Kelly, 372 S.C. 167, 171, 641 S.E.2d 468, 470 (Ct. App. 2007). Typically, that important duty of encouraging the jury to reach a verdict is accomplished by the trial judge presenting supplemental instructions advising the jurors in the majority and minority to consider each other's views, asking the jurors to give deference to one another's opinions, instructing the jurors to try to reach a decision *if* they are capable of doing so, and explaining the high societal costs associated with the retrial of a case. See Allen v. United States, 164 U.S. 492, 501 (1896) (finding no constitutional error in a supplemental charge to a deadlocked jury

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instructing absolute certainty cannot be expected, the verdict must be the verdict of each juror and not mere acquiescence in the views of the others, they should examine the case with candor and give proper deference and regard to one another's opinions, they had a duty to decide the case if they could conscientiously do so, they should listen to each other with a disposition to be convinced, and they should consider the position of jurors holding a differing opinion); Nickles, 74 S.C. at 141-142, 54 S.E. at 268 (finding a supplemental jury charge to a deadlocked jury in which the trial judge instructed the jury the expenses associated with trying the case were a "very strong reason" the jury ought to get together and agree upon a verdict was *not* coercive or erroneous). Significantly, the presentation of such a supplemental charge "has long been sanctioned[,]" and, by giving such a charge, a trial judge is merely discharging the judge's duty. Lowenfield v. Phelps, 484 U.S. 231, 237 (1988); see Nickles, 74 S.C. at 142, 54 S.E. at 268 ("A circuit judge is but discharging his duty to the public, and especially to the litigants, when he urges the jury to reach a verdict, provided nothing like coercion takes place.").

In Respondent Charles Brandon Rampey's case, the jurors—after the matter was submitted to them for decision on the second day of the two-day trial—deliberated in the jury room for approximately *fifty-one* minutes before returning with a few questions for the trial judge. (App'x pp. 235-237). Following that, the trial judge responded to the questions to greatest extent possible based on their nature, the jurors resumed their deliberations, and they deliberated in the jury room for roughly *eighty-four* more minutes before submitting a note that succinctly stated: "We are deadlocked." (App'x p. 238). Significantly, by that point, the jurors had deliberated for just two hours and fifteen minutes in total, and the longest single continuous stretch they spent deliberating together in the jury room was not even a full hour and a half in length. (App'x pp. 235-238).

Confronted with jurors ready to throw in the proverbial towel after a multi-day trial involving allegations of heinous child sexual abuse with less time spent in the jury room than necessary to sit through the average run-time of many high-grossing theatrical releases, the trial judge attempted to carry out his important duty to the public—and the litigants—and urge the jurors to attempt to agree upon a verdict. And, to satisfy that obligation, the trial judge—consistent with long-sanctioned practices in South Carolina and elsewhere in the nation—presented brief supplemental instructions that consisted of only 397 words delivered to the jurors in a span of no more than four minutes. (App'x pp. 238-240). Significantly, none of those 397 words were directed at the minority jurors, and no express statement a verdict had to invariably be reached was included amongst them. (App'x pp. 238-240). Meanwhile, roughly the first quarter of those words simply conveyed the trial judge's sympathy for the jurors based on the general difficulty any group of two or more people routinely experience when trying to agree on anything. (App'x pp. 238-239). Additionally, to ensure the jurors understood they were only being asked to make further efforts to *try* to reach an agreement, the trial judge "*ask[ed]*" the jurors at different points to "*see if* you [they] c[ould] come to some resolution in this case" and "to return to [their] jury room and *attempt* to come to a verdict." (App'x pp. 239-240). Furthermore, perhaps to ensure a group of jurors who arrived at an impasse in an exceedingly hasty fashion truly appreciated the gravity and importance of the proceedings, the trial judge did—as a majority of this Court later focused upon—at two points (with one involving half a sentence conveying ten words and the other involving a short sentence conveying six words) tell the jurors the parties deserved a resolution to the case and at two other points (with one involving two consecutive sentences conveying fifty-three words and the other involving half a sentence

conveying twenty words) call the jurors' attention to the resources expended in bringing the case to trial. (App'x pp. 239-240).

After receiving those supplemental instructions, the jurors returned to the jury room and deliberated for roughly *seventy-seven* additional minutes, which was a period of time just seven minutes shorter than their longest uninterrupted stretch of deliberations up to that point. (App'x p. 243). Ultimately, following deliberations totaling three hours and thirty-two minutes, the jurors arrived at a unanimous *split* verdict by which they *acquitted* Rampey of the second-degree criminal sexual conduct with a minor—the most serious of the two charges he was facing—and convicted him of the lesser offense of third-degree criminal sexual conduct with a minor. (App'x p. 243). And, after the verdict was announced, all the jurors raised their hands to confirm the announced verdict was their own. (App'x p. 243).

Now, through a published opinion issued on October 5, 2022, this Court analyzed the trial judge's supplemental instructions and affirmed—via a four-to-one majority decision—the reversal of Rampey's conviction for third-degree criminal sexual conduct with a minor based solely on their contents. State v. Rampey, Op. No. 28118 (S.C. Ct. App. filed Oct. 5, 2022). In doing so, the majority held those supplemental instructions were "unconstitutional" and warranted reversal upon finding they: (1) overemphasized the resources expended along with the need for a verdict; and (2) omitted language telling the jurors not to surrender their conscientiously-held beliefs for the sake of a verdict. By virtue of that holding, the portion of the jury's now-determined-to-be-coerced split verdict acquitting Rampey of the most serious charge he was facing will forever stand while the portion convicting him of the lesser of his charges will fall. Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, the State respectfully petitions for rehearing because it believes the majority misapprehended and overlooked several

critical points—in addition to the ones aptly raised by Justice Few in his thoughtful dissent and with which the State fully agrees—when finding the trial judge's four-minute-long, 397-word supplemental charge was unconstitutionally coercive under the specific facts and circumstances of Rampey's case.

First, in finding the supplemental instructions as a whole were unconstitutionally problematic due to their purported susceptibility of being interpreted as a command to the jurors they *had* to reach a decision in Rampey's case, the majority heavily focused on a few isolated portions of the trial judge's brief supplemental instructions indicating the parties deserved a decision and noting the expenditure of resources involved in bringing the matter to trial. But, in doing so, the majority overlooked the case-specific circumstances that *necessitated* the trial judge making those particular statements in this matter.

More specifically, the case at bar was not one in which the jurors only arrived at a deadlock after engaging in earnest efforts to reach a consensus as their deliberations prior to the reported deadlock could not legitimately be characterized as protracted in nature. Instead, as previously noted, Rampey's jurors indicated they were deadlocked after engaging in only a bit over two hours of deliberations, and, during that relatively concise period of time, the longest stretch in which they remained together uninterrupted in the jury room did not even reach ninety whole minutes. In fact, the jurors' deliberations prior to the announced deadlock were so brief, the majority found the giving of the Allen charge was "somewhat premature," which suggests the majority itself did not believe the jurors should have been or truly could have been hopelessly deadlocked so quickly.

Therefore, because the trial judge in Rampey's specific case was confronted with twelve jurors who collectively did not appear to fully appreciate the serious nature of what they were

being asked to do based on their willingness to abandon deliberation in a criminal trial involving exceedingly-serious charges after only a perfunctory effort at consensus, it was critically important for the trial judge to take steps to ensure those jurors truly understood the matter was *not* one to be treated lightly or flippantly. See Tucker v. Catoe, 346 S.C. 483, 491, 552 S.E.2d 712, 716 (2001) ("Whether an Allen charge is unconstitutionally coercive must be judged in its context and under all the circumstances." (citation and internal quotations omitted)); see also State v. Logan, 405 S.C. 83, 90, 747 S.E.2d 444, 448 (2013) ("In reviewing jury charges for error, this Court considers the trial court's jury charge as a whole and *in light of the* evidence and *issues presented at trial*." (emphasis added)); cf. People v. Ford, 577 N.E.2d 1034, 1035 (N.Y. 1991) ("Nor was the court's Allen charge . . . unbalanced or coercive for its failure to emphasize that 'the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows'. The supplemental instruction viewed as a whole was simply encouraging rather than coercive and was appropriate *in light of the fact that the 'deadlocked' jury had been deliberating for less than four hours*. (emphasis added and citations omitted)). In fact, it was the trial judge's duty to do so in order to enlighten them and ensure they carried out their important role in an appropriately-considerate manner. See State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987) ("The purpose of instructions is to enlighten the jury and to aid it in arriving at a correct verdict."). Accordingly, when viewed in the proper context as required, the trial judge's inclusion of contextually-necessary language stressing the importance of the proceedings to jurors whose limited efforts demonstrated a need for such supplemental instruction was not unconstitutionally coercive under the specific circumstances involved. See Tucker, 346 S.C. at 491, 552 S.E.2d at 716 (recognizing context matters when conducting a case-specific coerciveness analysis). And, that is particularly true in light of the fact such language

has previously been recognized by this Court as not being improperly coercive in precedential decisions that currently serve as guidance to our state's trial judges, including the one who was tasked with crafting the supplemental charge in Rampey's case. See State v. Lynn, 277 S.C. 222, 229, 284 S.E.2d 786, 790 (1981) ("We have approved similar language to that used by the trial judge to the effect that if the defendant is *entitled* to a verdict, he is *entitled* to it *now* and that if the State is *entitled* to a verdict, it is *entitled* to that verdict *now* and *not at some later date*." (emphasis added)); see also State v. Pauling, 322 S.C. 95, 99, 470 S.E.2d 106, 109 (1996) ("It is not coercion to charge that the failure to reach a verdict will require a new trial at additional expense."). Accordingly, this Court should grant rehearing and reconsider the matter while giving due consideration to the matter of *why* the trial judge included the language majority has found to have been problematically overemphasized under the particular circumstances of Rampey's case.

Second, even assuming the just-discussed portions of the supplemental instruction could somehow have been misconstrued as a command to the jurors they had to reach a verdict, the majority failed to give sufficient credence to the *other* language used that could only have dispelled any such misconstruction on the part of the jurors. More specifically, through his supplemental instructions, the trial judge included language indicating he was "ask[ing]" the jurors to "attempt" to come to a verdict. Necessarily, the use of the easily-understood and unambiguous word "attempt"—based on its plain definition—ensured the jurors would have understood they were only being asked to make an effort to *try* and reach a verdict as opposed to being ordered to arrive at one no matter what had be done to achieve that result. See New Oxford American Dictionary 103 (3rd ed. 2010) (defining "attempt" as "make an effort to achieve or complete"). And, by making it clear only an *effort* to reach an agreement was being

requested, that language communicated to the jurors they did not have to ultimately reach an agreement in the end and, thus, were obviously by extension not being asked to surrender their conscientiously-held beliefs simply to arrive at a verdict. See State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) ("The substance of the law is what must be charged to the jury, not any particular verbiage."); State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002) (explaining a trial judge is only required to instruct the jury on the substance of the law and does *not* have to use any particular verbiage when doing so).

In finding the trial judge's use of the word "attempt" was insufficient to prevent the supplemental instructions from being coercive, the majority determined that language was outweighed by the trial judge's several statements mentioning the parties deserved a decision and referencing the resources expended. But, in doing so, the majority appears to have overlooked the fact the word "attempt" was *not* the only mitigating language used by the trial judge. Instead, in addition to expressly advising the jurors he was only asking them to "attempt" to reach a verdict, the trial judge *also* made clear he was asking the jurors to "see if [they] c[ould] come to some resolution" in the matter. Critically, that phrase reinforced the same message conveyed by the trial judge's use of the word "attempt" and, thus, ensured the jurors would have unmistakably understood they were only being asked to see if a verdict was something that could *possibly* be achieved while simultaneously communicating that possibility remained an open inquiry. See New Oxford American Dictionary 865 (3rd ed. 2010) (defining "if" as "whether"); see also New Oxford American Dictionary 1968 (3rd ed. 2010) (defining "whether" as "expressing an inquiry or investigation"). Therefore, when viewed collectively and in context as required, the trial judge's supplemental instructions as a whole were not—and should not have been found to have been—unconstitutionally coercive based on the language used, which clearly conveyed to the

jurors they were being asked to try and *possibly* reach a verdict and, thus, could not have reasonably been interpreted by them as a command they had to reach one. See Todd v. State, 355 S.C. 396, 402, 585 S.E.2d 305, 308 (2003) (explaining jury instructions must be viewed as a whole and not in isolation when determining their propriety); cf. Victor v. Nebraska, 511 U.S. 1, 6 (1994) ("[T]he proper inquiry is not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it."); State v. Hughes, 336 S.C. 585, 598, 521 S.E.2d 500, 507 (1999) ("[T]he charge specifically instructs the majority to give 'equal consideration to the views of the minority.' Taken as a whole, this charge is an even-handed admonition to both the minority and majority jurors."); State v. Hicks, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998) (concluding no reasonable juror would have understood the trial judge's jury instructions to place the burden of proof of Hicks where "[t]he instructions specified the State had the overall burden of proof"). Accordingly, this Court should grant rehearing and reconsider the matter to ensure *all* the non-coercive language used by the trial judge is given proper consideration as required by to applicable totality-of-the-circumstances analysis.

Third, the majority—when examining facts and circumstances apart from the factors articulated by the United States Supreme Court in Lowenfield v. Phelps, 484 U.S. 231 (1988), and adopted by this Court in Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001)—appears to have overlooked a number of key factors pertinent to the analysis. Critically, when properly considered as part of the applicable totality-of-the-circumstances analysis as required, those key factors all strongly demonstrate the jury was *not* coerced in Rampey's case.

Initially and perhaps most importantly, the nature of the jury's verdict sharply undercut any finding of coerciveness because the jury returned a split verdict *acquitting* Rampey of his

most-serious charge. By returning a split verdict after engaging in its second-most-lengthy continuous period of deliberations, the jury evidenced thoughtful and reasoned decision-making instead of coerced agreement, which strongly demonstrated the trial judge's four minutes of supplemental instruction did not unconstitutionally coerce the split verdicts returned. See Smith v. State, 808 S.E.2d 661, 666 (Ga. 2017) ("Factors in determining whether requiring further deliberations was coercive include the length of trial, the length of deliberations before the jury indicates that it is deadlocked, the language of the jury's notes, the progress of the jury, the language of the Allen charge and other instructions regarding deliberations, the length of additional deliberations after the alleged coercion, *whether the jury found the defendant not guilty of any charges*, and the polling of the jury." (emphasis added)); cf. United States v. Cornell, 780 F.3d 616, 627 (4th Cir. 2015) ("[V]ery tellingly in this case, the jury returned a split verdict. Defendants' claim of coercion is negated by the fact that the jury *acquitted* three co-defendants and found predicate acts in only five of the nine categories submitted for their consideration. These actions reflect a thoughtful and deliberate jury—not one acting under an impulse of coercion.").

Beyond that, the conditions surrounding the jury's deliberation most definitely did not support a conclusion the jurors only returned a verdict due to coercion. Looking to those conditions, the jury only engaged in deliberations from 11:49 a.m. until 3:28 p.m. on the second day of a two-day trial. Based on that, the total deliberations remained relatively brief, the trial itself was very short, and all deliberating took place in the middle of the day without onerously extending into the evening or nighttime hours. Therefore, the conditions of the deliberations, which has been recognized by some courts as being *the* key factor to a coerciveness analysis, did not and could not support a finding the jurors were unconstitutionally coerced by the trial judge's

brief supplemental instructions that came towards the end of Rampey's brief trial. See Smith, 808 S.E.2d at 666, n. 5 (noting "the conditions under which a jury is forced to deliberate" has often been recognized to be "the key factor" to a finding of coercion and indicating problematic examples of coercive conditions include "sleep deprivation" and "a threat to keep the jurors together for an unreasonable or indefinite period of time until they agree on a verdict").

Furthermore, the polling of the jury *for unanimity purposes* strongly demonstrated an absence of coercion because nothing appearing in the record suggests any of the jurors wavered in any way when all twelve signaled the split verdict announced was their own. See id. at 666 (recognizing polling of the jury can be a pertinent factor in a coerciveness analysis). Significantly, the fact each of the jurors did nothing when properly polled for unanimity purposes that would have suggested any hesitancy or disagreement with the verdict announced helped to undercut any possibility the jurors only arrived at that announced *split* verdict due to undue or improper coercion.

Accordingly, rehearing should be granted to allow for *all* the relevant factors to be considered collectively as part of a totality-of-the-circumstances analysis as was necessary for such an analysis to truly be completed. And, such a review should convincingly demonstrate reconsideration of the majority's finding of coerciveness is needed because those key factors taken together collectively demonstrate the trial judge's jury instructions were not unconstitutionally coercive under the specific facts and circumstances of Rampey's case.

Fourth and finally, the majority's statement in its discussion of the standard by which it was reviewing the trial judge's supplemental instructions indicating it was applying "heightened scrutiny" warrants reconsideration or, at a minimum, further clarification. Significantly, such reconsideration or clarification is needed because—as is typically true with jury charges in South

Carolina—the matter of what particular wording to use for a jury charge designed to aid a jury in overcoming a deadlock is presently left largely to the sound discretion of our state's trial judges. See, e.g., State v. Holmes, 277 S.C. 232, 234, 285 S.E.2d 353, 354 (1981) (recognizing a trial judge does not have to use any particular language when instructing the jury so long as the instructions given adequately cover the relevant and applicable law). Based on that, a trial judge's discretionary decision regarding how to word such a charge should be reviewed for an abuse of discretion like any other discretionary charging decision and only reversed on appeal when the appellant can satisfy his burden of establishing the trial judge's supplemental instructions were, in fact, unconstitutionally coercive. See Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) ("An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion."); cf. United States v. Wills, 88 F.3d 704, 717 (9th Cir. 1996) ("We review a trial court's decision to give an Allen instruction for abuse of discretion. The district court's deliverance of an Allen charge must be upheld unless it is clear from the record that the charge had an impermissibly coercive effect on the jury." (citations and internal quotations omitted)); State v. Brand, 544 S.W.3d 284, 292 (Mo. Ct. App. 2018) ("To demonstrate an abuse of discretion, the appellant must show from the record that the jury's verdict was coerced. The verdict is considered coerced only when under the totality of the circumstances it appears that the trial court was virtually directing that a verdict be reached and by implication indicated that it would hold the jury until a verdict was reached." (citations and internal quotations omitted)). And, pursuant to the standard for reviewing jury charges that has traditionally been applied up to this point, the theoretical possibility a charge *could have* been viewed in an *unconstitutional* manner would not be sufficient to establish the trial judge committed an abuse of discretion. See Victor, 511 U.S. at 6 (recognizing the question

of whether a charge *could have been* applied in an unconstitutional manner is *not* the proper test for determining whether a charge was constitutionally improper); see also United States v. Parker, 16 F. App'x 682, 684 (9th Cir. 2001) (explaining the form of an Allen charge does not constitute an abuse of discretion even if some other proposed form of the charge would have been "as good or better"). Accordingly, rehearing or clarification is warranted to ensure the majority's standard of "heightened scrutiny" remains consistent with the abuse of discretion standard of review applicable to an analysis of a charging decision that has so far been left to the trial judge's sound discretion.[1]

Conclusion

For all those reasons coupled with the reasons articulated in the State's brief, during oral argument before this Court, and in Justice Few's well-reasoned dissent, the State respectfully asks this Court to reconsider the matter pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, vacate its prior opinion, and issue a new opinion affirming Rampey's conviction after finding the trial judge's brief supplemental instructions totaling just 397 words did not unconstitutionally coerce a group of twelve jurors who themselves showed no signs of having been coerced. By doing so, this Court will avoid unnecessarily reversing a conviction while at the same time upholding an acquittal based on nothing more than a trial judge's faithful attempt to carry out his duty to the public. See Lynn, 277 S.C. at 228, 284 S..E.2d at 790 ("It is important that the trial of causes should be ended. A circuit judge is but discharging his duty to

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[1] Alternatively, if unclarified "heightened scrutiny" is to remain, it may be time for—as Justice Hearn alluded to during the oral argument in Rampey's case—this Court to provide a model instruction for our trial judges to follow going forward in order to best ensure any supplemental instructions given to break a deadlock are capable of surviving this Court's new—but largely undefined—"heightened scrutiny" standard. Cf. State v. Logan, 405 S.C. 83, 99-100, 747 S.E.2d 444, 452-453 (2013) (articulating a specific circumstantial evidence jury instruction that must be given upon request).

the public, and especially to the litigants, when he urges the jury to reach a verdict, provided nothing like coercion takes place.”).

Respectfully submitted,

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